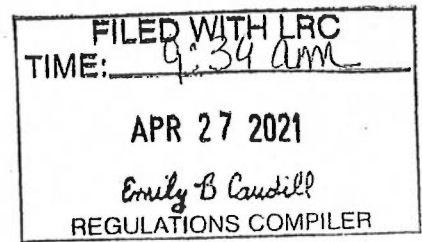


NOTICE

Amendment to 803 KAR 2:250, Discrimination, was filed with the Legislative Research Commission on April 27, 2021.

The amendment is posted at <https://legislature.ky.gov>. Select the Kentucky Law Tab, Kentucky Administrative Regulations, KAR List by Title, then Title 803 Labor Cabinet and scroll down to the regulation under Chapter 2 Occupational Safety and Health.

Changes to the regulation and public hearing information is available at the aforementioned website or in the pages below following this notice.



1 Labor Cabinet

2 Department of Workplace Standards

3 Division of Occupational Safety and Health Compliance

4 Division of Occupational Safety and Health Education and Training

5 (Amendment)

6 803 KAR 2:250. Discrimination.

7 RELATES TO: KRS 338.015[(7)], 338.121, 338.991

8 STATUTORY AUTHORITY: KRS 338.051, 338.061

9 NECESSITY, FUNCTION, AND CONFORMITY: KRS 338.051(3) requires the Occupational
10 Safety and Health Standards Board to promulgate occupational safety and health administrative
11 regulations and authorizes the chairman to reference federal standards without board approval if
12 necessary to meet federal time requirements. KRS 338.061 authorizes the board to establish,
13 modify, or repeal standards and reference federal standards. This administrative regulation
14 establishes the procedure for discrimination complaints pursuant to KRS 338.121.

15 Section 1. Definitions. (1) "Commissioner" is defined by KRS 338.015(7).

16 (2) "Complainant" means any person who makes a complaint as defined by subsection (3) of this
17 section.

18 (3) "Complaint" means any oral or written communication related to an occupational safety and
19 health concern made by an employee to an employer, governmental agency, or made to the
20 commissioner or the commissioner's designee.

21 (4) "Review commission" is defined by KRS 338.015(8).

1 (5) [(4)] "Secretary" is defined by KRS 338.015(12).

2 (6) "Working days" means Monday through Friday and does not include Saturday, Sunday,
3 federal, or state holidays, as well as the day of receipt of notice.

4 Section 2. Complaint [~~Procedure for Complaint to the Commissioner; Recipient of; Time for~~

5 ~~Filing; Form of Complaints~~]. (1) An employee or former employee may file an oral or written

6 complaint with the commissioner or commissioner's designee alleging discrimination [~~with the~~
7 ~~commissioner or the commissioner's designee~~].

8 (2) A complaint shall be filed no more than 120 days from the occurrence of the alleged
9 discriminatory activity.

10 (3) A complaint shall provide [state] the name and address of the complainant, name and address
11 of employer, and description of alleged discrimination.

12 (4) The commissioner or commissioner's designee shall provide the employer notification of the
13 complaint upon initiation of an investigation [~~Notification shall be given to the employer of the~~
14 ~~receipt by the commissioner of a complaint within five (5) working days~~].

15 Section 3. Settlement. (1) Settlement is encouraged at any stage of the proceedings if the
16 settlement is consistent with [~~the provisions and objectives of~~] KRS Chapter 338.

17 (2) Primary consideration shall be the reinstatement of a complainant to his or her former
18 position with back pay and assurance of the future protection of the rights of all employees
19 pursuant to [~~under~~] KRS Chapter 338.

20 Section 4. Withdrawal of Complaint to the Commissioner. (1) A request by the complainant to
21 withdraw a complaint filed with the commissioner shall be given careful consideration and
22 substantial weight.

(2) The commissioner or commissioner's designee shall make the final determination if a complaint and subsequent investigation will be terminated.

Section 5. Arbitration or Other Agency Proceedings. (1) A complainant may pursue grievance arbitration proceedings in collective bargaining agreements while requesting relief from other agencies such as the National Labor Relations Board.

(2) The commissioner's jurisdiction to receive KRS 338.121(3) complaints, to investigate, and to determine if discrimination [has] occurred shall be independent of the jurisdiction of other agencies or bodies.

(3) The commissioner or commissioner's designee may investigate and issue citations against any party found in violation regardless of the pendency or determination of other proceedings.

(4) If a complainant is pursuing remedies other than those provided by KRS 338.121, the commissioner's determination [and deferral to the results of the proceedings] may be postponed.

Section 6. ~~[Investigation of Complaint to the Commissioner; Issuance of Citation; Notice to Parties; Right of Review.]~~ (1) Investigation. (a) Upon receipt of a complaint [under Section 2 of this administrative regulation], the commissioner or commissioner's designee shall initiate [cause] an investigation [to be instituted].

(b) The investigation shall be completed and the commissioner's determination issued within ninety (90) days, absent extenuating circumstances.

(2) Citation. (a) ~~[(2)]~~ If the commissioner finds a violation of KRS 338.121, he or she shall issue a citation, with delivery or receipt confirmation, and recommend a penalty pursuant to KRS 338.991.

(b) The citation shall include a determination by the commissioner as to the merits of the alleged violation.

1 (c) The commissioner or commissioner's designee shall provide notice of the determination to all
2 affected parties.

3 (d) The citation shall state that it shall be deemed the final order of the review commission and
4 not subject to review by any court or agency unless, within fifteen (15) working days from the
5 date of receipt of the notice, the employer notifies the commissioner in writing that the employer
6 intends to contest the citation before the review commission.

7 (e) The commissioner shall immediately transmit a notice to contest to the review commission in
8 accordance with the rules of procedure prescribed by the commission.

9 (3) Penalty. (a) The commissioner shall determine the amount of a proposed penalty, based on
10 the appropriateness of the penalty with respect to the:

11 1. Size of the business of the employer being charged,

12 2. Gravity of the violation,

13 3. Good faith of the employer, and

14 4. History of previous violations.

15 (b) Penalties shall be proposed with respect to an alleged discriminatory act even if the employer
16 immediately abates, or initiates steps to abate, the alleged violation.

17 ~~[(3) Notice of the determination shall be given to all affected parties.]~~

18 (4)(a) If the commissioner determines there has not been discriminatory action, the complainant
19 shall be notified of his or her rights of review [of the determination].

20 (b)[(a)] 1. The complainant may petition the secretary for a review of the determination.

21 2. The petition shall be in writing and state reasons why the review is requested.

22 (c)[(b)] The secretary shall affirm the determination or remand it to the commissioner for further
23 investigation[-

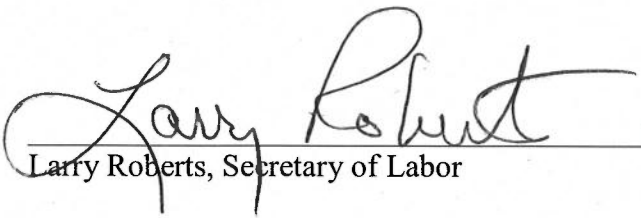
1 ~~Section 7. Employer Contest. A citation and notice of proposed penalty shall state that it shall be~~
2 ~~deemed the final order of the Review Commission and not be subject to review by any court or~~
3 ~~agency unless, within fifteen (15) working days from the date of receipt of the notice, the~~
4 ~~employer notifies the Commissioner of the Department of Workplace Standards in writing that~~
5 ~~the employer intends to contest the citation and notification of proposed penalty before the~~
6 ~~Review Commission. Within seven (7) days of receipt of contest, the commissioner shall~~
7 ~~forward copies of the citation and proposed penalty and notice of contest to the Review~~
8 ~~Commission.~~

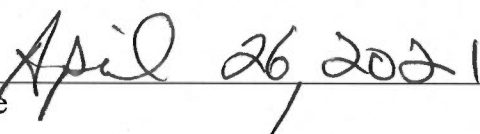
9 ~~Section 8. Proposed Penalties. (1) If a citation is issued, the commissioner shall notify the~~
10 ~~employer by certified mail of the proposed penalty established in KRS 338.991.~~

11 ~~(2) The commissioner shall determine the amount of a proposed penalty, based on the~~
12 ~~appropriateness of the penalty with respect to the size of the business of the employer being~~
13 ~~charged, the gravity of the violation, the good faith of the employer, and the history of previous~~
14 ~~violations.~~

15 ~~(3) Penalties shall be proposed with respect to an alleged discriminatory act even if the employer~~
16 ~~immediately abates, or initiates steps to abate, the alleged violation].~~

As approved by


Larry Roberts, Secretary of Labor


Date

PUBLIC HEARING AND PUBLIC COMMENT PERIOD: A public hearing on this administrative regulation shall be held on July 21, 2021 at 10:00 am (ET). The meeting will be conducted by live videoconference (ZOOM) pursuant to Senate Bill 150, Section 1, subparagraph (8) b (2020) and the continuing state of emergency. Public access to the meeting will be available at

<https://us02web.zoom.us/j/86731399141?pwd=Q2VOcDQ3ZkVBaUtoNERCMDNlKzZlZz09>, password 446261; or by telephone at (713) 353-0212, (888) 822-7517 toll free, conference code 194378.

Individuals interested in being heard at this hearing shall notify this agency in writing five (5) working days prior to the hearing of their intent to attend. If no notification of intent to attend the hearing is received by that date, the hearing may be canceled. This hearing is open to the public. Any person who wishes to be heard will be given an opportunity to comment on the proposed administrative regulation. A transcript of the public hearing will not be made unless a written request for a transcript is made. If you do not wish to attend the public hearing, you may submit written comments on the proposed administrative regulation. Written comments shall be accepted through July 31, 2021. Send written notification of intent to be heard at the public hearing or written comments on the proposed administrative regulation to the contact person.

CONTACT PERSON: Robin Maples, OSH Standards Specialist, Labor Cabinet, Mayo-Underwood Building, 500 Mero Street, 3rd Floor, Frankfort, Kentucky 40601, Telephone: (502) 564-4107, Facsimile: (502) 564-4769, Email: Robin.Maples@ky.gov.

REGULATORY IMPACT ANALYSIS AND TIERING STATEMENT

Regulation Number: 803 KAR 2:250

Contact person: Robin Maples (502) 564-4107, Robin.Maples@ky.gov, Facsimile: (502) 564-4769

(1) Provide a brief summary of:

(a) What this administrative regulation does: Section 1 of this administrative regulation, effective since February 10, 1987, defines terms. Section 2 establishes procedures for occupational safety and health (OSH) discrimination complaints pursuant to KRS 338.121 and 29 CFR Part 1977. This amendment also updates this administrative regulation to meet KRS Chapter 13A considerations and was reviewed in accordance with House Bill (HB) 50 from the Regular Session of the 2017 General Assembly. Amendments to this regulation are technical and intended to maintain consistency with other regulations.

(b) The necessity of this administrative regulation: This administrative regulation was reviewed in accordance with HB 50 from the Regular Session of the 2017 General Assembly. This regulation is necessary to meet the requirements established in Public Law 91-596 84 STAT. 1590 Section 18 (OSH Act of 1970), 29 CFR 1902.3(c), 29 CFR 1902.3(d), 29 CFR 1953.1(a), 29 CFR 1953.1(b), and 29 CFR 1956.2(a), which all require Kentucky OSH regulations to be as effective as the federal requirements. This regulation is equivalent.

(c) How this administrative regulation conforms to the content of the authorizing statutes: KRS 338.051(3) requires the Kentucky OSH Standards Board to promulgate OSH administrative regulations. This regulation is necessary to meet the requirements established in Public Law 91-596 84 STAT. 1590 Section 18 (OSH Act of 1970), 29 CFR 1902.3(c), 29 CFR 1902.3(d), 29 CFR 1953.1(a), 29 CFR 1953.1(b), and 29 CFR 1956.2(a), which all require Kentucky OSH regulations to be as effective as the federal requirements. This regulation complies and conforms with the authorizing statutes.

(d) How this administrative regulation currently assists or will assist in the effective administration of the statutes: This administrative regulation promotes worker safety and health throughout Kentucky and ensures the state is as effective as the federal requirement. This regulation is necessary to meet the requirements established in Public Law 91-596 84 STAT. 1590 Section 18 (OSH Act of 1970), 29 CFR 1902.3(c), 29 CFR 1902.3(d), 29 CFR 1953.1(a), 29 CFR 1953.1(b), and 29 CFR 1956.2(a), which all require Kentucky OSH regulations to be as effective as the federal requirements. This regulation is equivalent.

(2) If this is an amendment to an existing administrative regulation, provide a brief summary of:

(a) How the amendment will change this existing administrative regulation: Section 1 of this administrative regulation, effective since February 10, 1987, defines terms. Section 2 establishes procedures for OSH discrimination complaints pursuant to KRS 338.121 and 29 CFR Part 1977. This amendment also updates this administrative regulation to meet KRS Chapter 13A considerations and was reviewed in accordance with HB 50 from the Regular Session of the 2017 General Assembly. Amendments to this regulation are technical and intended to maintain consistency with other regulations.

(b) The necessity of the amendment to this administrative regulation: This administrative regulation was reviewed in accordance with HB 50 from the Regular Session of the 2017 General Assembly. This regulation is necessary to meet the requirements established in Public Law 91-596 84 STAT. 1590 Section 18 (OSH Act of 1970), 29 CFR 1902.3(c), 29 CFR 1902.3(d), 29 CFR 1953.1(a), 29 CFR 1953.1(b), and 29 CFR 1956.2(a), which all require Kentucky OSH regulations to be as effective as the federal requirements. This regulation is equivalent. Amendments to this regulation are technical and intended to maintain consistency with other regulations.

(c) How the amendment conforms to the content of the authorizing statutes: KRS 338.051(3) requires the Kentucky OSH Standards Board to promulgate OSH administrative regulations. This regulation is necessary to meet the requirements established in Public Law 91-596 84 STAT. 1590 Section 18 (OSH Act of 1970), 29 CFR 1902.3(c), 29 CFR 1902.3(d), 29 CFR 1953.1(a), 29 CFR 1953.1(b), and 29 CFR 1956.2(a), which all require Kentucky OSH regulations to be as effective as the federal requirements. This regulation complies and conforms with the authorizing statutes.

(d) How the amendment will assist in the effective administration of the statutes: This amendment maintains consistency with the federal requirements. This amendment promotes employee health and safety throughout Kentucky and keeps the state program consistent with the federal program.

(3) List the type and number of individuals, businesses, organizations, or state and local governments affected by this administrative regulation: This administrative regulation affects all employers in the Commonwealth covered by KRS Chapter 338.

(4) Provide an analysis of how the entities identified in question (3) will be impacted by either the implementation of this administrative regulation, if new, or by the change, if it is an amendment, including: (a) List the actions that each of the regulated entities identified in question (3) will have to take to comply with this administrative regulation or amendment: No additional compliance duties are imposed and no immediate action is required.

(b) In complying with this administrative regulation or amendment, how much will it cost each of the entities identified in question (3): There is no additional cost to the OSH Program to implement this administrative regulation.

(c) As a result of compliance, what benefits will accrue to the entities identified in question (3):

This administrative regulation promotes worker safety and health throughout Kentucky and ensures the state is as effective as the federal requirement.

(5) Provide an estimate of how much it will cost to implement this administrative regulation: (a) Initially: There is no cost to the OSH Program to implement this administrative regulation.

(b) On a continuing basis: There is no continuing cost to the OSH Program to implement this administrative regulation.

(6) What is the source of the funding to be used for the implementation and enforcement of this administrative regulation: Current state and federal funding.

(7) Provide an assessment of whether an increase in fees or funding will be necessary to implement this administrative regulation, if new or by the change if it is an amendment: There is neither an increase in fees nor an increase in funding necessary to implement this amendment.

(8) State whether or not this administrative regulation establishes any fees or directly or indirectly increases any fees: This administrative regulation neither establishes any fees nor directly or indirectly increases any fees.

(9) TIERING: Is tiering applied? Tiering is not applied. All employers covered by KRS Chapter 338 are treated equally.

FEDERAL MANDATE ANALYSIS COMPARISON

Regulation Number: 803 KAR 2:250

Agency Contact: Robin Maples (502) 564-4107, Robin.Maples@ky.gov, Facsimile: (502) 564-4769

1. Federal statute or regulation constituting the federal mandate.

Public Law 91-596 84 STAT. 1590 Section 18 (OSH Act of 1970), 29 CFR 1902.3(c), 29 CFR 1902.3(d), 29 CFR 1953.1(a), 29 CFR 1953.1(b), 29 CFR 1956.2(a)

2. State compliance standards.

The Kentucky OSH Program is mandated to be at least as effective as the federal requirement. Accordingly, in order to maintain the state program as effective as the federal program, Kentucky must adopt the federal requirement or develop an equivalent standard. This regulation is equivalent.

3. Minimum or uniform standards contained in the federal mandate.

Public Law 91-596 84 STAT. 1590 Section 18 (OSH Act of 1970), 29 CFR 1902.3(c), 29 CFR 1902.3(d), 29 CFR 1953.1(a), 29 CFR 1953.1(b), 29 CFR 1956.2(a)

4. Will this administrative regulation impose stricter requirements, or additional or different responsibilities or requirements, than those required by the federal mandate? This administrative regulation establishes procedures for occupational safety and health (OSH) discrimination complaints pursuant to KRS 338.121 and 29 CFR Part 1977.

5. Justification for the imposition of the stricter standard, or additional or different responsibilities or requirements: This amendment does not impose stricter requirements.

FISCAL NOTE ON STATE OR LOCAL GOVERNMENT

Regulation Number: 803 KAR 2:250

Contact Person: Robin Maples (502) 564-4107, Robin.Maples@ky.gov, Facsimile: (502) 564-4769

1. What units, parts or divisions of state or local government (including cities, counties, fire departments, or school districts) will be impacted by this administrative regulation?

This administrative regulation affects any unit, part, or division of state or local government covered by KRS Chapter 338.

2. Identify each state or federal statute or federal regulation that requires or authorizes the action taken by the administrative regulation.

KRS 338.051, KRS 338.061, Public Law 91-596 84 STAT. 1590 Section 18 (OSH Act of 1970), 29 CFR 1902.3(c), 29 CFR 1902.3(d), 29 CFR 1953.1(a), 29 CFR 1953.1(b), 29 CFR 1956.2(a)

3. Estimate the effect of this administrative regulation on the expenditures and revenues of a state or local government agency (including cities, counties, fire departments, or school districts) for the first full year the administrative regulation is to be in effect.

None.

(a) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for the first year?

None.

(b) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for subsequent years?

None.

(c) How much will it cost to administer this program for the first year?

There are no costs associated with this amendment.

(d) How much will it cost to administer this program for subsequent years?

There are no costs associated with this amendment.

Note: If specific dollar estimates cannot be determined, provide a brief narrative to explain the fiscal impact of the administrative regulation.

Revenues (+/-): Unknown.

Expenditures (+/-): Unknown.

Other explanation: This amendment does not impose any additional requirements or expenditures.